EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Nicole O'Brien

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NOS.: 98/533 & 98/534

DATE OF DECISION: September 11, 1998

DECISION

OVERVIEW

This is an appeal by Nicole O'Brien, under Section 112 of the *Employment Standards Act* (the "*Act*"), against two Determinations which were issued by a delegate of the Director of Employment Standards on July 31, 1998. One of the Determinations was issued against Pacific Nursing Referrals Inc. ("Pacific Nursing"), Ms. O'Brien's former employer. The other Determination was issued against Julie Posein, a director/officer of Pacific Nursing Referrals Inc. In both Determinations the Director's delegate determined that Ms. O'Brien is entitled to be paid $1,533.24 in unpaid wages. He also determined that Ms. O'Brien " ... is not entitled to the amount of the net profit claimed for the period of July 3 - July 31, 1998 as she has only estimated the amount and does not have an accurate reflection of the actual net profit, if any, for the period in question."

Ms. O'Brien's appeals are based on her submission that she is entitled to a monthly income "... based on 35% of Pacific Nursing Referrals Inc. receivable"(sic). That entitlement, she submits, arises from an agreement dated July 3, 1998.

Although duly notified of the two appeals and of the right to reply, the Tribunal has not received any submission from either Pacific Nursing or Julie Posein. As a result, this Decision arises from my review and analysis of the Determinations and Ms. O'Brien's submission dated August 11, 1998.

ISSUE TO BE DECIDED

Did the Director's delegate err in determining that Ms. O'Brien is not entitled to "... the amount of the net profit claimed for the period July 3 - July 31, 1998"?

FACTS

Ms. O'Brien and two other employees made a complaint under the *Act* in which they alleged that Pacific Nursing owed them wages and vacation pay. They also alleged that cheques given to them by Pacific Nursing had not been honored by the financial institution on which they were drawn. This Decision deals only with Ms. O'Brien's appeals.

The Director's delegate sets out Pacific Nursing's response to Ms. O'Brien's complaint:

> Agreed that she owed $600.76 for two NSF cheques. Did not know if there were outstanding wages owed for the period June 20, 1998 to July 1, 1998. Agreed that vacation pay had not been paid. Disagreed the any wages were owed for the period of July 3, 1998 to July 31, 1998. Stated there was a profit sharing agreement in place for the period in question in July 1998 and

> that there were no profits therefore there were no monies due and payable for this period of time. Claimed she would be in a position to pay the outstanding wages by August 21, 1998.
>
> (reproduced as written)

The Director's delegate summarized Ms. O'Brien's complaint as follows:

> Nicole O'Brien - claims she worked as a home care worker from January 15, 1998 until July 1, 1998. During this period of time her rate of pay was $10.00 per hour and was increased to $11.00 per hour in June of 1998. In June, 1998 she was given two cheques totalling $600.76. The cheques were not honoured by the financial institute on which they were drawn. Furthermore, Ms. O'Brien has not been paid for the period June 20, 1998 to July 1, 1998. During this period of time she worked 48 hours at her regular wage of $11.00 per hour, 8 hours at a time and one half her regular wage ($16.50) for working the statutory holiday of July 1, 1998, plus another day off of 8 hours for working the statutory holiday.
>
> From July 3, 1998 to July 30, 1998 (the date the complaint was filed) Nicole O'Brien worked as a manager of the company at the rate of 35% of the net profit. This arrangement was made with the sole owner and director/officer of the company Julie Posein. Ms. O'Brien estimates the net profit for this period of time to be $4,040.00. This amount is based on established income of $7,500.00 from the one client of the company less the wages and expenses of the company which she estimated.

The full text of the Agreement which was dated July 3, 1998 was signed by Julie Posein and Nicole O'Brien, is as follows:

> This letter of agreement confirms the sale of thirty-five percent shares to Nicole O'Brien, of the "company", Pacific Nursing Referrals Incorporated. The details are outlined as follows:
>
> 1. that Nicole O'Brien will purchase 35% shares of the "company" for a total amount of $4000.00 (four thousand dollars).
> 2. that Julie Posein will remain majority share-holder, at 65% shareholder.
> 3. that neither Nicole O'Brien nor Julie Posein will sell any shares to any prospective buyers without the sole permission of all shareholders.
> 4. that Nicole O'Brien will hold the position of "Director", and that Julie Posein remains President of the "company" as majority shareholder.
> 5. that all financial documents and official documents pertaining to the company will be disclosed to all shareholders upon request.
> 6. that all business will be carried out in the manner of which the "company" was formed, specifically a home support agency.

7. that all banking transactions will require a "double signature", respective to the shareholders of the company.
8. that Nicole O'Brien will attend to personnel, case planning, and general management of all home support employees, and that Julie Posein will oversee these duties along with the management of nursing staff and duties.
9. that this agreement is binding and is effective on the date of signing.
10. that if the company is dissolved or deemed bankrupt, the shareholders agree to contribute the balance of monies held in the company account to the creditors owed before withdrawing the balance of funds.

This agreement is dated the third day of July, 1998, in the city of Surrey, BC.

Following his investigation, the Director's delegate made the following findings of fact:

- All three employees have been given cheques that have failed to clear the financial institute on which they were drawn.
- The employer does not dispute that vacation pay is owed to the employees.
- All three employees have a record of the hours for which they have not been paid. The employer has not disputed these hours.
- Nicole O'Brien has no documentation to establish what, if any, profits were earned by the company for the month of July 1998.

He went on to determine Ms. O'Brien's entitlements under the *Act*, as follows:

I have determined that **Nicole O'Brien** is entitled to:

- Regular wages for the period June 20 - June 30 (48 hours x $11.00 = $528.00)
- Overtime wages for July 1, 1998 (8 hours x $16.50 = $132.00)
- Statutory holiday pay for July 1, 1998 (8 hours x $11.00 = $88.00)
- Vacation pay of 4% of $4,612.00 = $184.48
- Two NSF cheques in the total amount of $600.76
- Total amount due **$1,533.24.**

I have determined that **Nicole O'Brien is not** entitled to:

- The amount of the net profit claimed for the period July 3 - July 31, 1998 as she has only estimated the amount and does not have an accurate reflection of the actual net profit, if any, for the period in question.

In her appeal submission to the Tribunal, Ms. O'Brien identifies the facts in dispute, as follows:

> The facts that are in dispute are that I have no documentation for Pacific Nursing Referrals Inc. income. I have made requests to see company statements on receivables and banking statements and these requests have been refused by director of PNR Inc., Julie Posein. I did see one payment received in the beginning of July from Public Trustee, Pat Stott for approximately $1,500. There were five billing weeks in July, thus I have concluded Pacific Nursing Referrals Inc. income for July was $7,500.

Based on that submission and her understanding of her entitlements under the Agreement of July 3, Ms. O'Brien calculates her entitlement to salary for the month of July, 1998 as follows:

Receivables totalling	$7,500.00
Employees wages	$2,480.00
Company Expenses (Utilities etc.) (there is no rent owed for the month of July because the office was moved to her home)	$ 400.00
	$4,620.00
35% ($4,620.00) =	$1,617.00

Ms. O'Brien seeks, by way of remedy, a decision by the Tribunal that she is entitled to receive wages of $1,617.00 in addition to the wage amount ($1,533.24) to which the Director's delegate determined that she was entitled.

ANALYSIS

Ms. O'Brien's appeal is based on the ground that she is entitled to a "monthly income based on 35% of Pacific Nursing Referrals Inc. receivables" (sic) as a result of the Agreement dated July 3, 1998. She acknowledges that she has no documentation to establish the exact amount of her entitlements under the Agreement. However, in my view, both the Director's delegate and Ms. O'Brien have directed their attention to irrelevant issues by focusing their efforts on attempting to calculate Nursing's "net profit" for the period July 3 - July 31, 1998.

In my view, whatever payments to which Ms. O'Brien may be entitled as a *shareholder* under the Agreement dated July 3, 1998 have no relevance to her entitlement to "wages" as an "employee" under the *Act*. I hold that opinion primarily because of the definition of "wages" and "work" in Section 1 of the *Act*:

"wages" includes

(a) salaries, commissions or money, paid or payable by an employer to an employee for work,
(b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,
(c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,
(d) money required to be paid in accordance with a determination or an order of the tribunal, and
(e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person,

but does not include

(f) gratuities,
(g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,
(h) allowances or expenses, and
(i) penalties;

"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

(2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

Of particular importance, I believe, is the requirement that “salaries commissions or money” must be paid or payable by an “*employer*” to an “*employee*” for *work*. The purchase of shares by a shareholder does not create an environment relationship and any payments to which a shareholder may be entitled under a share purchase agreement would not arise from “work” as defined under the *Act*.

There is no dispute that Ms. O’Brien became a director of Pacific Nursing on July 3, 1998 as evidenced by the Agreement which she entered into on that date. However, as noted in a recent decision by the Tribunal, *Mark Graham Annable* (BC EST #D342/98), at page 6:

> There is *nothing* in the *Act* that purports to exclude directors or officers from claiming unpaid wages. While it is true that directors or officers can be held liable for up to 2 months’ unpaid wages for those employees who were not paid by the corporation, this provision does not act as a bar to any claim that might be advanced by a director or officer so long as that individual meets the statutory definition of “employee” (as Annable clearly does) and the claim is for “wages” as defined in the *Act* (as is the case here with respect to the claims now before me). Directors or officers are not

> listed among the various categories of individuals who are excluded from the provisions of the *Act* in sections 31 and 32 of the *Employment Standards Regulation.*
>
> It may well be that in an appropriate case (and this is not that case), an officer or director will have his or her unpaid wages attached under section 89 in order to satisfy that individual's liability under a section 96 determination. However, there is a distinction to be drawn between wage *entitlement* and *enforcement.* Thus, an officer or director is not, by reason of that status alone, disentitled from claiming wages, provided that individual is an employee, and further provided that the claim is properly characterized as a claim for wages. However, those wages may, in turn, be attached by the Director in order to satisfy other employees' wage claims that have been crystallized into a section 96 determination. I would certainly reject the proposition, implicit in the instant Determination, that an employee, who may also have been a director or an officer of the employer--or some associated firm--cannot file a complaint under the *Act* for unpaid wages, particularly when that person has never been named in a section 96 determination.
>
> It should be recalled that section 2 states that the purposes of the *Act* include the promotion of fair treatment of employees and the establishment of fair and efficient dispute resolution procedures. If the Director's position espoused in this case was upheld, employees who are also directors or officers of their employer (or of an associated firm) would be forced to file their wage claims in the courts and thus would be denied access to the inexpensive and comparatively expeditious wage recovery provisions contained in the *Act.* I, for one, do not believe that there is much to commend in such a policy; even less, when that policy is enunciated despite the complete absence of any legislative authority to do so.

In an earlier Decision, *Barry McPhee* (BC EST #D183/97), the Adjudicator made the following observations at page 5:

> 1. The definition of "employer" under the *Act* is not confined to traditional concepts identifying the master/servant relationship under the common law. It is cast in sufficiently broad terms to allow the purposes of the *Act* to be realized and should be given a liberal interpretation. The definition allows more than one "person" to be treated as an employer. In this case, McPhee, Youngberg and Bodlack, as well as the company, meet the definition.
>
> 2. The definition of "employee" is also stated in broad terms and indicates an intention by the legislature to cast the statutory net of the *Act* as far as the its purposes, governed by some rational limitations, will justify. We note in this context a key purpose of the *Act* is to ensure the basic standards of compensation and conditions of employment are received by employees.

3. There is nothing in the above definitions (nor in any other part of the Act or the Regulations to the Act) that precludes the conclusion an employer by definition cannot also be an employee by definition.

4. In spite of the above observations, the *Act* does not exclude the application of the normal concepts of the law of master and servant. In this context, Courts have stated partners cannot be employed by the partnership, any more than a person can be his own employee. This notion has also been extended to directors of companies, who, it has been decided, are not considered to be employees at common law unless they can prove an independent contract of employment.

The Adjudicator went on to observe:

> The *Act* exists, in large part, for the benefit and protection of employees who otherwise have no control over decisions of their employer about the terms and conditions under which they will be employed. A key purpose is to ensure the application of minimum standards of compensation and conditions of employment, including hours of work, overtime pay, leaves of absence, annual and statutory holidays and holiday pay and length of service compensation for termination without notice, for those employees. Despite the broad language used to define who is an employee, it is not a reasonable interpretation of that language, taking into account the scope, purposes and the over-all objectives of the *Act,* to conclude it is intended to embrace the controlling minds of the company...

However, he also offered the following note of caution at page 6:

> I do not wish to be taken as saying a person who is an employer could never be an employee under the *Act*. But in such a case (as it is in this one), the onus would be on the person asserting the status of employee to show a clearly worded agreement establishing the employer/employee relationship, the authority by which the company is able to establish the relationship with that person, the services to be performed for the "salary" to be paid and the capacity in which the person is performing the services. It will be seldom a controlling mind of a company will be found to be an employee under the *Act*. Additionally, Adjudicators for the Tribunal are not required to park their practical common sense and experience of business affairs at the door of the hearing room. The Tribunal must carefully consider the context in which a company director, officer, owner or manager seeks to claim employee rights and to pay particular attention to the purposes and over-all objectives of the *Act*. For example, where the result of a claim would give the "employee" statutory priority over the claims of third parties, the Tribunal will be meticulous in ensuring the employment relationship is real and the wages were earned.

In *Canadian Imperial Bank of Commerce* v. *General Wholesale Products Corp.* (B.C.S.C., unreported, New Westminster Registry No. C910211, June 18, 1991) the B.C. Supreme Court dealt with the question of whether Wayne Orthner, who was a shareholder and the general manager of General Wholesale, could rely, as an employee, on Section 15 of the *Employment Standards Act* (S.B.C. 1980 Ch. 107.1) to claim an entitlement to garnished funds in priority to other creditors. Mr. Orthner had sought an order to that effect from the Director of Employment Standards to claim entitlement to "... eight weeks

severance pay and 4% holiday pay" (sic). The Director refused to make the order requested by Mr. Orthner "... on the basis of a policy guideline which states that remedies under the *Act* will not be provided to any applicant owning one-third or more of the company with which the employment contract was made." The Court went on to note, at page 3:

> Without seeking to cast doubt on the integrity of Mr. Orthner's wrongful dismissal claim, it can be noted that the Director's policy of not enforcing remedies under the *Act* for corporate part-owners/employees is intended to prevent the *Act* being used to orchestrate the diversion of corporate assets into the pockets of an "owner-employee" ahead of any and all creditors through the use of wrongful dismissal action.

After an careful analysis of the statutory definition of "wages", the provisions of Section 15 (unpaid wages constitute a lien), the Director's discretionary powers under the *Act* and other statutory interpretive matters, the Court did not overturn the Director's policy guidelines which were in effect at that time:

> A court must be hesitant, save where an unfair or discriminatory refusal of assistance is involved, to interfere with the discretion bestowed by the Legislature.
>
> Counsel for Orthner in his Chamber brief states that the policy of the Director to refuse to assist applicants who are directors and shareholders from claiming benefits under the *Act* is applied without justification or authority since the *Act* in no way distinguishes among employees so as to specify entitlement and/or disqualification.
>
> This argument fails to recognize the broad discretion which the *Act* gives the Director to decide whether or not to enforce a claim for benefits. Whether a policy of denying benefits to employees who own a third or more of the corporate employer is either unreasonable or arbitrary and unfair is an arguable point. Nevertheless the *Act* gives the director the latitude to apply such a policy rule in order to avoid abuse of creditors' security.
>
> Section 15 states that the lien is constituted "in favour of the Director". The purpose of the lien is to secure priority for claims the Director regards as properly owing over those of their creditors. Nothing in the wording of the section reveals any intention to depart from the general design of the *Act* viz-a-viz the central decision making role of the Director whether to grant a remedy exercisable by the employee against the desires of the Director.

There is nothing in the Determinations to indicate what the Director's current policy is with respect to not enforcing remedies under the *Act* for "corporate part-owners/employees."

Under the Agreement of July 3, 1998 Ms. O'Brien is required to "...attend to personnel, case planning and general management of all home support employees..." This implies that there continued to be an employment relationship between Pacific Nursing and Ms. O'Brien after July 3, 1998. Ms. O'Brien estimates her salary entitlement for the month of July, 1998 as being at least $1,617.00 based on what she knows about Pacific Nursing's revenues and expenses. She acknowledges that she has no documentation to support her calculations and she submits, that is because her requests for information have gone unanswered by Julie Posein and Pacific Nursing. Ms. O'Brien also submits that she did not provide a copy of her work schedule to the Tribunal because her salary was to be based on the business' income rather than the number of hours which she worked.

Section 1 of the *Act* defines "regular wage" as meaning:

"regular wage" means

> (a) if an employee is paid by the hour, the hourly wage,
> (b) if an employee is paid on a flat rate, piece rate, commission or other incentive basis, the employee's wages in a pay period divided by the employee's total hours of work during that pay period,
> (c) if an employee is paid a weekly wage, the weekly wage divided by the lesser of the employee's normal or average weekly hours of work,
> (d) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work, and
> (e) if an employee is paid a yearly wage, the yearly wage divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work;

Thus, for purposes of determining an employee's entitlement under the *Act*, the number of hours he or she worked during a period of employment is relevant.

I note that the Director's delegate made a finding that Ms. O'Brien was an employee, that she had a record of the hours she had worked and for which she had not been paid, and that Pacific Nursing "...has not disputed these hours." Section 16 of the *Act* requires an employer to pay "...at least the minimum wage as prescribed in the regulations." Effective April 1, 1998 the minimum wage is $7.15 per hour (see Section 15 *Employment Standards Regulation* (BC Reg 385/97). Thus, in the absence of a proper exercise of the Director's discretion not to enforce a provision of the *Act*, Ms. O'Brien would be entitled to be paid at least the minimum wage ($7.15 per hour for all hours worked) in the absence of a finding by the Director's delegate that she is entitled to a higher hourly wage. The Director's delegate found that Ms. O'Brien's hourly wage rate was $11.00 per hour during the month of June, 1998 and on July 1, 1998. The Determination does not make any findings about Ms. O'Brien's hours of work or her entitlement to "wages" for the period July 3-31, 1998. As noted above, the Director's delegate determined that Ms. O'Brien is not entitled to "...the amount of net profit claimed by her." However, in my view, Ms.

O'Brien's entitlements as an employee under the *Act* are separate and distinct from her rights as a shareholder under the Agreement. That, in my opinion, is a serious error given the above analysis of her entitlements to wages under the *Act*.

For all of these reasons, I find it necessary to refer the matter back to the Director's delegate for further investigation.

ORDER

I order, under Section 115 (1)(b) of the *Act*, that the matter be referred back to the Director for further investigation consistent with the findings of fact and reasons which I have set out above.

Geoffrey Crampton
Chair
Employment Standards Tribunal